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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
CLERK

NO. PD-1229-16

ERNESTO LERMA, Appellant	§ § §	IN THE COURT FILED COURT OF CRIMINAL APPEALS 3/15/2018 DEANA WILLIAMSON, CLERK
vs.	§ §	OF CRIMINAL APPEALS
THE STATE OF TEXAS, State	§ §	OF THE STATE OF TEXAS

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

NOW COMES ERNESTO LERMA, the Appellant herein, by and through undersigned counsel, and moves the Court for a rehearing pursuant to 79 of the Texas Rules of Appellate Procedure (T.R.A.P.), and in support thereof would show the following grounds and argument:

I.

THE COURT'S OPINION CONFLICTS ITS OWN PRECEDENT

The Court's opinion in this case conflicts with this Court's holding in *Camouche v. State*, 10 S.W.3d (Tex.Crim.App. 2000). In *Camouche*, the officer's initial frisk pat-down (where cash was found on his person was justified under *Terry*. *Id.* at 328-329. However, the subsequent pat-down (when the cocaine was discovered) after the appellant's alleged consent was evaluated independent of the first. *See id.* at 331, Sec. V. In other words, the justification of the first pat-down did not automatically justify the second. This Court held that because the consent for

the second pat down was not deemed voluntary, the second search was not justified.

Here, Appellant maintains that none of the pat-downs were justified. However, even if the initial pat-down was permissible, that does not make the subsequent one acceptable. The reasoning the Court uses to justify the search was based on factors that may have been present before the first pat-down, not the later one. It was not until Officer Salinas was going to pat-down Appellant a subsequent time that Appellant admitted he had synthetic on his person. This was after the initial questioning, pat-down, and then computer check. No weapons were found on Appellant's person after the first search, thus dissipating any lingering fear. There was no action by Appellant after the first pat-down that would have led Salinas to believe Appellant was committing or had committed a crime. Nor did Salinas point to any articulable facts to meet the reasonable suspicion threshold for the continued detention and subsequent search. If not the first, then surely the latter pat-down exceeded the scope of *Terry*. The limited frisk does not extend to multiple pat-downs, as argued below.

II.

THE COURT'S OPINION CONFLICTS WITH THE PRECEDENT SET FORTH IN *TERRY*: THE SEARCH EXCEEDS THE PARAMETERS OF WHAT IS PERMISSIBLE

A. There are no specific articulable facts to meet the threshold of *Terry*

This Honorable Court found that a reasonably objection person would fear for

their safety or the safety of others. However, in order to reach that conclusion, the officer must be able to point to specific and articulable facts which would reasonably lead him to conclude that the individual might be armed. *Terry v. Ohio*, 392 U.S. at 27. By Salinas' own admission, there are none here; nervousness and fidgety behavior are insufficient. Explanatory searches are not permitted.

B. No reasonable person would justifiably believe that his safety or the safety of any person was in danger to justify a pat-down, regardless of Officer Salina's subjective opinion.

The driver of Appellant's vehicle pulled into a well-lit parking lot of a medical building across the street from a hospital. Although Officer Salinas was outnumbered, the driver stayed inside the vehicle, along with the woman and child, who posed no risk. Only Appellant was pulled out of the vehicle. When the second officer arrived, Salinas had already patted down Appellant and found no weapons. Therefore, any reasonable fear of danger was dispelled by the time Appellant was outnumbered by the officers.

i. This case is distinguishable from *O'Hara*.

This Court noted three things in *O'Hara*, none of which were prevalent here. Salinas was not alone when he conducted the third pat-down search and found the contraband (his back-up had already arrived); although it was late, it was not the middle of the night and they were in a well-lit medical parking lot across from the

hospital (see Video of stop); Salinas was not aware that Appellant had a pocket knife until *after* Salinas said he was going to conduct the first pat-down. *O'Hara* found that a reasonable officer would have feared for his safety because the belt knife was in plain view on O'Hara's belt, as opposed to here, where Salinas made the decision to pat-down before Appellant disclosed his pocket knife.

C. Even if the first pat-down was justified, *Terry* does not extend to multiple pat-downs

This Honorable Court's holding justifies the pat-down. However, nothing was found in the initial pat down – no weapon and no contraband. The parameters of *Terry* do not reach so far as to include multiple pat-downs. *See Camouche*, *supra.* The search "must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'" *Minn. V. Dickerson*, 508 U.S. 366, p. 373 (1993), *quoting Terry*. <u>If the search goes beyond what is necessary to determine if the person is armed and dangerous, it is no longer valid under *Terry* and its fruits will be suppressed.</u> *Id., citing Sibron v. New York*, 392 U.S. 40, 65-66 (1968). Salinas admitted that he felt no weapons after the first pat-down and was searching for illegal narcotics, which he found in the later pat-down after he had back-up and knew that Appellant had no weapons on his person. Thus, the fruits of the search should be suppressed.

D. The Computer check of the driver had already been completed before the

second pat-down

This Court's opinion rests heavily on the misconception that Officer Salinas had not finished the background check on the driver while he was investigating Appellant. However, Officer Salinas testified that he did the warrant check of the driver when he went to his patrol unit, *before* returning back to Appellant to continue interrogating him and search Appellant a second and third time. R.R. p. 39, Ln. 8-12. By his own admission, the computer check had already been completed on the driver shortly after his backup arrived, and Officer Salinas had already made a determination with regard to the traffic stop long before that. R.R. p. 39, Ln. 13-16.

E. Even if the computer check had not been completed, this alone is insufficient to justify the detention

Even if Salinas had not completed the check on the driver before the detention, that would not be enough to justify the continued detention and subsequent search. "The linchpin for analyzing the reasonableness of a detention, therefore, is the scope of reasonable suspicion, *i.e.*, the reasonable suspicion that justified the detention, rather than the completion of a computer check." *United States v. Brigham*, 343 F.3d 500 (5th Cir. 2004). Because there was no reasonable suspicion to justify the detention, the computer search waiting game is not a determining factor. As such, the search goes beyond the scope of *Terry* and was improper.

III.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the undersigned counsel, on behalf of Appellant, respectfully prays that this Honorable Court grant this Motion for Rehearing for the reasons set forth herein.

Respectfully Submitted,

/s/ Celina Lopez Leon
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ATTORNEY FOR APPELLANT,
ERNESTO LERMA

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing motion has been served upon Ms. Stacey M. Soule, Esq., State Prosecuting Attorney, Austin, Texas, on this 11th day of March, 2018.

/s/ Celina Lopez Leon
CELINA LOPEZ LEON

RULE 9.4(i) CERTIFICATION

In compliance with Tex. R. App. P. 9.4(i)(3), I certify that the number of words in this motion, excluding those matter listed in Rule 9.4 is 1,213.

/s/ Celina Lopez Leon
CELINA LOPEZ LEON